80-1170

No. _____

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., INLAND METALS REFINING COMPANY, INC., KEYSTONE RESOURCES CORPORATION AND RSR CORPORATION,
*Petitioners,*

v.

SECRETARY OF LABOR AND OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND SUPPORTING APPENDIX

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EDWARD L. MERRIGAN
6000 Connecticut Avenue, N.W.
Washington, D.C. 20015
656-0210

*Attorney for Petitioners NARI, et al.*

January, 1981

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## QUESTIONS PRESENTED

1. May the Occupational Safety and Health Administration (OSHA) give offical notice under the Occupational Safety and Health Act[1] that it is planning to promulgate a 100 ug/m$^3$ maximum lead exposure standard; conduct hearings thereon, during which all affected industries and OSHA's own experts seriously question both the technological and economic feasibility of that "100" standard; and then suddenly arbitrarily adopt a far lower 50 ug/m$^3$ standard without establishing in any respect either the technological or economic feasibilitly of said "50" standard, as required by Section 6(b)(5) of the Act?

2. May OSHA thereupon lawfully require the entire national primary lead smelting industry, the entire national secondary lead smelting industry, and other industries that necessarily utilize lead in their production processes to rebuild, at staggering cost, their entire plants to attempt to meet said 50 ug/m$^3$ standard thus adopted, or cease operations — again, without demonstrating it is technologically or economically feasible for those industries to comply with the arbitrarily-prescribed standard?

3. May OSHA then also invidiously and destructively discriminate against the relatively small, independent secondary lead smelters, which recycle lead and constantly compete here in the United States and abroad with the comparatively large, integrated primary lead smelters in the marketing and pricing of lead products, by compelling the smaller secondary smelters (i) to bear significantly higher compliance costs than the primary smelters, and (ii) to comply fully with the new, arbitrary 50 ug/m$^3$ standard within *five (5) years*, while the competing

[1] Pub.L. 91-596, 29 U.S.C. 651, et seq.

primary smelters are granted ten *(10) years* to achieve that same compliance?

A subsidiary question thus presented is: Does the court of appeals' majority opinion — which labeled this 'discrimination' issue one of "*the most serious industry arguments*"[2] and one that will necessarily place "*the secondaries . . . at some competitive disadvantage with respect to the primaries*"[3] — conflict with prior court of appeals' decisions which hold that agencies such as OSHA may not inflict discriminatory compliance requirements on competing industry segments, if such discrimination threatens to benefit one segment at the expense of the other (*Industrial Union Dept., AFL/CIO* v. *Hodgson*, 499 F.2d 467, 478-81 (1974); *International Harvester Company* v. *Ruckelshaus*, 478 F.2d 615, 636-38 (1973); *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 389-90 (1973))?

4. May OSHA lawfully impose the new 50 ug/m$^3$ lead exposure standard in this case on the entire national lead recycling industry without first establishing it is "*reasonably necessary*" within the meaning of Section 3(8) of the Occupational Safety and Health Act,[4] and without providing any *cost-benefit analysis* to demonstrate it is both *appropriate* and *necessary* to provide safe, healthful places of employment in that industry?

5. In addition to the foregoing, may OSHA, without any specific statutory authority of any kind in the Occupational Safety and Health Act, constitutionally

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[2] App. to petitioner LIA's petition for certiorari, pg. 194a.

[3] *Id.*, at pg. 194a.

[4] Pub.L. 91-596, §3(8), 29 U.S.C. 652(8)

and lawfully compel all *small, independent* employers in the national lead recycling industry subject to the new 50 ug/m$^3$ standard also to establish and maintain extemely costly, unworkable Medical Removal Protection and Multiple Physician Review programs, again, without establishing the *feasibility* of such requirements for such employers?

6. Did OSHA deny lead recylers throughout the United States due process of law by adopting the costly, discriminatory Lead Standard challenged in this case without effectively affording them clear, advance notice that (a) they would be confronted with the need to comply with a 50 ug/m$^3$ maximum exposure level rather than the 100 ug/m$^3$ level originally proposed, and (b) they would also be confronted with the extremely discriminatory, destructive, nonuniform compliance costs and compliance timetables described above? Does the court of appeals' ruling in this case thus conflict with the ruling of the Third Circuit in *Synthetic Organic Chemical Manufacturers Association* v. *Brennan*, 506 F.2d 385, 388 (3d Cir., 1974), cert. *den.* 423 U.S. 830 (1978), and the rulings of other federal courts under other statutes in *Arlington Oil Mills, Inc.* v. *Knebel*, CCA5, 1976, 543 F.2d 1092, *American Iron and Steel Institute* v. *Environmental Protection Agency*, CCA3, 1977, 568 F.2d 284, 290-292 and *American Standard, Inc.* v. *United States*, C.Cls., 1979, 602 F.2d 256, 267-269?

## LIST OF PARTIES

The names of petitioners and intervenors who sought review of the OSHA Lead Standard challenged in this case, are set forth in the companion petition for certiorari filed by Lead Industries Association, Inc., et al.

(No. 80-1134).[5] The respondents are the Secretary of Labor and the Occupational Safety and Health Administration.

Petitioner National Association of Recycling Industries, Inc. (NARI) is the trade association for the nation's metals, paper, textile and rubber recycling industries. Its membership consists of more than 1,100 firms located throughout the United States, all of which are engaged in the collection, processing or industrial utilization of the aforementioned recyclable commodities. NARI files the instant petition on behalf of those of its members who are engaged in the collection, processing and industrial utilization of recyclable lead and/or lead-bearing metals.

Petitioners Inland Metals Refining Company, Inc., Keystone Resources Corporation and RSR Corporation, in turn, are members of NARI and each is engaged in the processing and smelting of recyclable lead and/or lead-bearing metals.

Petitioners furnish the following additional information pursuant to Rule 28.1 of this Court's Rules: Petitioner Inland Metals Refining Company, Inc. has no parent or subsidiary corporations to report. It is, however, affiliated with Lake Calumet Smelting Co., of Chicago, Illinois.

Petitioner Keystone Resources Corporation has a parent company, Lambert-Brussels Corp., of New York. It also has the following subsidiaries: KMC, Inc.; KMC International, Inc.; Cleveland Electro Metals Corp.; and Keystone Resources Custom Recovery Corp., of California. This petitioner has no affiliates.

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[5] See LIA petition, pgs. ii, iii, ftnt. 1.

Petitioner RSR Corporation has no parent or affiliates to report. It does have the following subsidiaries: Murph Metals, Inc.; Revere Smelting & Refining Corp., of New Jersey; Quemetco, Inc.; and Bestolise Corp. — all of Dallas, Texas.

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### OPINION BELOW

The opinion of the court of appeals is unofficially reported at 8 O.S.H.C. 1810 (8/28/80), and it also appears in the appendix to the petition for certiorari of Lead Industries Association, Inc. in the companion case,

at pages 1a through 286a.[6] OSHA's occupational exposure to lead standard was issued on November 13, 1978 and published at 43 Fed. Reg. 53007-14 (11/14/78), as corrected by 44 Fed. Reg. 5446-48 (1/26/79) and 44 Fed. Reg. 20680-81 (4/6/79). The preamble and explanatory text issued by OSHA when the lead standard was published are found at 43 Fed. Reg. 52952-53007 (11/14/78) and pages 54354-509 (11/21/78), and are cited in this petition by Federal Register page and column numbers (e.g., 52952/1).

## JURISDICTION

The judgment of the court of appeals was rendered on August 15, 1980. Timely petitions for rehearing and reconsideration were filed by petitioner National Association of Recycling Industries, Inc. (NARI) on August 29, 1980, and, as authorized by the court of appeals, by Lead Industries Association, Inc. (LIA) and others on September 25, 1980. The court of appeals issued a series of orders dated October 24, 1980 (see *Appendices A through C* hereto), which denied all petitions for rehearing, as well as a motion for stay of the OSHA standard which had also been filed.

Subsequent applications to this Court for a stay of said standard by NARI, the American Iron and Steel Institute, LIA and others were granted on December 8, 1980 with respect to provisions relating to engineering and work practice controls, compliance plans, new hygiene facilities, certain tests, multiple physician review procedures, signs and certain startup dates.

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[6] The majority opinion was written by Chief Judge Wright, with Circuit Judge Robinson concurring. A dissenting opinion was filed by Circuit Judge MacKinnon.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTE INVOLVED

The statutory provisions involved in this case are Sections 3(8), 4(b)(4), 6(b)(5) and 6(f) of the Occupational Safety and Health Act (the "Act"), 29 U.S.C. §§652(8), 653(b)(4), 655(b)(5) and 655(f). The relevant text of these provisions is set forth at pages 287a through 290a of the appendix to the petition of LIA, et al. in the companion case before this Court. Procedural regulations of OSHA under the Act are found at 29 C.F.R. Part 1911.

## STATEMENT OF THE CASE

The court of appeals' opinion in this case recognizes from the very outset that lead exists naturally in the earth's crust, the atmosphere, and the hydrosphere — and for thousands of years, human beings have found lead crucial to the manufacture of a vast number of essential products.[7]

At one time in recent history, an industrial airborne lead exposure limit of *500 ug/m*$^3$ was generally accepted in the United States.[8] In 1971, the newly-created Occupational Safety and Health Administration (OSHA) established *200 ug/m*$^3$ — 'the national concensus standard' recommended by the American National Standards Institute — as the permissible industrial lead exposure level (PEL) under the Occupational Safety and Health Act of 1970 (the Act).[9] In 1975, however, after discus-

[7] App. to LIA petition, pg. 8a.

[8] *Id.*, at pg. 9a. 500 ug/m$^3$ is, of course, 500 micrograms of lead per cubic meter of air.

[9] *Id.*, at 9a. The 200 ug/m$^3$ PEL was measured as a time-weighted average for 8 hours of work.

sions between OSHA and the National Institute for Occupational Safety and Health (NIOSH), OSHA published notice in the Federal Register of its intention to reduce the prevailing 200 ug/m$^3$ PEL to 100 ug/m$^3$[10]

There was *no* hint in the 1975 notice, published in the Federal Register as aforesaid, (a) that the PEL actually thereafter adopted by OSHA would be a far lower 50 ug/m$^3$; or (b) that different segments within the lead industry would be subjected to radically different, discriminatory compliance costs and time limits; or (c) that employers subject to the new standard would also be required to provide extremely costly, largely unworkable Medical Removal Protection (MRP) and Multiple Physician Review (MPR) programs for their employees, regardless of each employer's particular size or financial capabilities.[11] Instead, OSHA initially proposed in 1975 such supplemental provisions as environmental monitoring, medical surveillance, employee training and other similar, relatively resonable protective measures.[12]

Section 6(b)(5) of the Occupational Safety and Health Act, entitled " *Standards*," contains a Congressional mandate that the Secretary of Labor shall promulgate standards which are "*feasible*," and that "*feasibility*" must be based "*on the best available evidence.*"[13] In this case, however, since OSHA originally contemplated and published a proposed *100 ug/m$^3$* standard only, practically all evidence adduced at the

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[10] See 40 F.R. 45934 (1975).

[11] See 40 F.R. 45934 (1975).

[12] *Id.*

[13] 29 U.S.C. §655(b) (5).

subsequent hearings, as well as the feasibility studies made for OSHA by its own outside consultants, dealt *exclusively* with the feasibility of said "100" standard, *not* the 50 ug/$m^3$ standard ultimately arbitrarily adopted by OSHA at the end of the administrative proceedings.[14] Thus, insofar as 'feasibility' of the 50 ug/$m^3$ standard is concerned, the court of appeals' majority opinion concedes OSHA's findings are mere "*highly speculative guesstimates*," based entirely on evidence dealing with the far higher *100 ug/$m^3$* standard originally proposed in 1975.[15]

Judge MacKinnon's dissenting opinion is more direct and to the point. It states:[16]

> "The OSH Act, 29 U.S.C. §655(b)(5) (1976), requires that the standards promulgated by the agency be based upon the 'best available evidence.' It is conceded by OSHA and the majority that very little record evidence exists for the technological feasibility of the 50 ug/$m^3$ air-lead level, *and no evidence exists to support the economic feasibility of that level.* OSHA never even introduced its own witnesses to testify on these issues; instead it concentrated on the feasibility of the proposed 100 ug/$m^3$ level. . . ."

Thus, contrary to the clear-cut requirements of Section 6(b)(5) of the Act, there is *no* sustainable evidence in the record in this case to establish that the 50 ug/$m^3$ standard, finally arbitrarily adopted byOSHA, is *feasible* for secondary smelters of recyclable lead. This alone is sufficient, petitioners respectfully submit, to vitiate the

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[14] App. to LIA petition, pgs. 39a, ftnt. 32; 169a; 170a.

[15] *Id.*, at 170a.

[16] *Id.*, at 271a.

50 ug/m$^3$ standard under the Act as it applies to recyclers.

However, the fundamental *illegality* of the "50" standard for secondary lead smelters is magnified and aggravated almost beyond belief by the following additional facts:

1. *Technological Infeasibility Of The 100 ug/m$^3$ Standard* — The evidence of record in this case actually demonstrates that even the higher *100 ug/m$^3$* standard originally proposed by OSHA may likewise be clearly *technologically infeasible* for them.[17] Secondary smelters handle "pure lead as compared to what the primary smelter handles."[18] Experts thus testified at the hearings in this case that "engineering controls alone might be incapable of achieving *100 ug/m$^3$* in two [of the secondary smelters'] operations — *slag handling* and *battery breaking*."[19] Other experts "expressed doubt whether conventional controls could reduce exposure to 100 ug/m$^3$ in the secondary smelters' *scrap handling operations*."[20] Indeed, the majority opinion of the court of appeals concedes that it might also be impossible for secondary smelters to maintain even a *100 ug/m$^3$* PEL in *blast furnace areas* without the use of respirators — this, Judge Wright wrote, is "very speculative."[21] Finally, in the record before this Court, "OSHA virtually concedes that maintenance workers in secondary smelters will have to continue to wear respirators."[22]

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[17] *Id.*, at 181a-196a.

[18] *Id.*, at 182a.

[19] *Id.*, at 183a; 186a; 188a.

[20] *Id.*, at 186a, 187a.

[21] *Id.*, at 187a, 188a.

[22] *Id.*, at 190a.

2. *Economic Infeasibility Of The 100 ug/m³ Standard* — In order to comply with even the higher 100 ug/m³ PEL without respirators, all secondary smelters, most of which are small and presently operate with "relatively little capital investment,"[23] *would necessarily have to rebuild their plants from the ground up* — assuming, of course, conversion to something like Denmark's "Bergsoe Process" (upon which the court of appeals relied so heavily in its majority opinion) is ultimately legitimately proved to be available, attainable and effective.[24] Such complete rebuilding is obviously expensive.[25] The cost estimates in the record before the Court range between $90.6 million and $630 million, plus additional annual costs of at least $9.8 million, simply to meet, if possible, the higher 100 ug/m³ standard originally proposed by OSHA.[26] And, as the court of appeals' majority opinion concedes:[27]

> "OSHA confessed difficulty in adjusting this estimate to the problem of meeting the 50 ug/m³ standard. . . ."

OSHA's experts estimated there are between 40 and 140 small, independent secondary smelters in the United States.[28] They thereupon warned OSHA that crushing requirements such as those described above could force all, or certainly most, of the secondary smelters to close their plants within a period of 5 to 7 years (see *Appendix D* hereto).[29]

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[23] *Id.*, at 191a.

[24] *Id.*, at 184a.

[25] *Id.*, at 184a.

[26] *Id.*, at 191a, 192a.

[27] *Id.*, at 191a.

[28] *Id.*, at 182a.

[29] *Appendix D.*

Thus, the record in this case also raises grave doubts about the *economic feasibility* of even OSHA's original *100 ug/m*$^3$ PEL insofar as secondary smelters of lead are concerned.

The unbelieveable incongruities of this case insofar as secondary smelters of recycled lead are concerned unfortunately do not end there. OSHA's consultants reported to OSHA that "the domestic secondary smelting industry is one of the most successful recycling operations in the world," and that the recycled lead it produces "has become a perfect substitute for primary lead."[30] Thus, both OSHA and the court of appeals found that the small, independent secondary lead smelters constantly compete with the large, integrated primary lead smelters in the marketing and sale of lead.[31] The large, primary smelters, however, control the pricing structure for the entire industry, so secondary smelters cannot raise their prices to pass OSHA compliance costs along to their customers, unless the primary smelters first raise their prices sufficiently to enable the competing secondary smelters to pass along such costs.[32]

OSHA's consultants therefore advised OSHA that, since the primary smelters control the entire industry's pricing structure, the small, competing secondary smelters might be effectively precluded from passing OSHA compliance costs through to customers — and this also could soon force the bulk of the secondary smelters to close their plants.[33] This, the consultants

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[30] *Id.*

[31] App. to LIA petition, pg. 193a.

[32] Id., at 193a.

[33] *Appendix D*; App. to LIA petition, at 193a.

warned, would eliminate substantial competition in the lead industry and cause monopolistic concentrations.[34]

OSHA not only rejected its consultants' admonitions — it arbitrarily went further and actually imposed both (a) grossly discriminatory, *higher compliance* costs, and (b) a grossly discriminatory, *shorter compliance deadline* on the secondary smelters. Thus, OSHA ordered the secondary smelters fully to comply with the impossible *50 ug/m*$^3$ standard *within five (5) years*, while it simultaneously favored the competing, larger primary smelters with a *ten (10) year compliance deadline and significantly lower compliance costs.*[35]

Faced with this unfathomable record, the court of appeals necessarily concluded:[36]

> "We think it possible that the secondaries will remain at some competitive disadvantage with respect to the primaries."

Nevertheless, the lower court's majority opinion refused to rectify this impossible competitive situation in line with the governing authorities, *infra*, by groundlessly asserting:[37]

> "[T]his disadvantage, if it does exist, will not pose a *fatal* threat to the secondary smelting industry."

That conclusion, of course, is diametrically at odds with the position taken by the President's Council on Wage and Price Stability before OSHA in this case. The

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[34] *Appendix D.*

[35] App. to LIA petition, at 194a-196a.

[36] *Id.*, at 196a.

[37] *Id.*

Council advised OSHA that it opposed the proposed reduction of the existing 200 ug/m³ lead standard to 100 ug/m³ (*Appendix E* hereto). It urged OSHA to consider two alternatives: (A) Rigid enforcement of the existing *200 ug/m³* standard, or (b) Adoption of NIOSH's recommended *150 ug/m³* standard (*Appendix E*). The Council then stated:[38]

> "Anticompetitive effects of the proposed regulation are potentially major in the secondary smelting and battery manufacturing industries. These two industries are characterized by the existence of a few very large firms and numerous small firms. . . .
>
> "The secondary lead smelting industry is involved in producing refined lead from reclaimed scrap materials. This secondary lead is a perfect substitute for refined lead from primary smelters. Secondary lead accounts for 50% of the total production of lead, and it is produced by four large firms and numerous small firms. Easier entry into this area of the lead production industry exerts pressure on what otherwise could be an oligopolistic industry. Unfortunately, the proposed lead standard, with its *high capital costs of compliance (that do not vary in proportion to capacity)* may force many of the smaller firms to close. . . . [S]uch a reduction in the competitive nature of the market may impose other costs on society which should be considered when costs and benefits of proposed regulations are weighed." [Italics supplied.]

Sadly, however, OSHA failed to make any *cost-benefit analysis* of either the 50 ug/m³ or 100 ug/m³ lead standards for the secondary smelting industry.

Instead, OSHA added insult to injury insofar as the secondary smelters are concerned by also imposing addi-

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[38] *Appendix E* hereto.

tional extremely costly, entirely unworkable Medical Removal Protection (MRP) and Multiple Physician Review (MPR) requirements on these small firms — requirements which likewise "*do not vary in proportion to capacity*," and which again invidiously discriminate against the secondary smelters by forcing them to bear higher estimated MRP costs than those their competitors in the primary smelting industry will have to shoulder. And, as the court of appeals recognized in a footnote to its majority opinion:[39]

> "OSHA concedes that removal (MRP) may pose a somewhat greater problem for small employers who have less flexibility in creating transfer opportunities. . . ."

Again, however, the court of appeals did nothing to require OSHA at least "*to vary*" these requirements "*in proportion to capacity*," as the President's Council urged during the administrative proceedings before OSHA.

It should be noted, of course, that the MRP program mandated by OSHA for all small employers in the secondary lead smelting industry is substantially more onerous than the MRP requirements OSHA prescribed in the "cotton dust" standard involved in *American Textile Manufacturers Institute, Inc.* v. *Marshall*, Docket Nos. 79-1429, 1583, wherein this Court recently granted certiorari.[40]

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[39] App. to LIA petition, at 237a, ftnt. 166.

[40] The majority opinion of the court of appeals in this case recognizes that the MRP provision in OSHA's lead standard is very different from the MRP program involved in the "cotton dust" case and is "relatively without precedent." See Maj. Op. at 12a; 22a, ftnt. 15; 66a, ftnt. 63.

## ARGUMENT

**THIS IS A PROPER CASE FOR CERTIORARI BECAUSE THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. MOREOVER, THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER, AND THE COURT OF APPEALS HAS DECIDED CERTAIN FEDERAL QUESTIONS IN THIS CASE IN CONFLICT WITH THIS COURT'S RECENT DECISIONS IN THE BENZENE AND WHIRLPOOL CASES**

The court of appeals' majority opinion recognizes from the very outset that this case presents "a number of important questions on appeal [which] are very close," and that Judge MacKinnon's dissenting opinion raises "serious questions about a number of aspects of [OSHA's] rule-making" in this case.[41] The dissenting opinion, in turn, states:[42]

> "This case should be . . . remanded: (1) to correct the improper use of consultants, (2)to issue a proper Notice of Rulemaking on the 50 ug/m$^3$ standard and conduct a proper hearing thereon with right of cross-examination, (3) to produce substantial evidence, subject to cross-examination, that properly supports the feasibility of the standard . . ., (4) to strike the medical removal protection system because it directly violates the prohibition of the Act

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[41] App. to LIA petition, at 7a, ftnt. 6.

[42] *Id.*, at 247a.

> against 'superseding] or in any manner affect[ing] any workmen's compensation law,' (5) to hold further hearings on the feasibility of the standard imposed because it is not presently supported by substantial evidence and violates the holding in the recent Benzene Case, *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, _____ U.S. _____, 48 U.S.L.W. 5022 (July 2, 1980) by relying on impermissible presumptions, (6) to employ proper methods as outlined hereafter in determining the feasibility of the lead standard, and (7) to make a cost-benefit analysis to determine if the evidence supports a finding of significant benefits derived from economic feasibility."

Plainly, as the dissenting opinion suggests, this case involves vitally important questions of federal law under the Occupational Safety and Health Act which have not been, but must be, settled by this Court. The court of appeals' majority opinion also conflicts with this Court's recent decisions in the Benzene Case (*Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. _____, 100 S.Ct. 2844 (1980)) and in the Whirlpool Case (*Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 100 S.Ct. 883, 894 (1980)); it raises, in different, more compelling context, other questions which are now before this Court in *American Textile Mfrs. Institute* v. *Marshall*, Nos. 79-1429 and 1583; and its approval of OSHA's grossly discriminatory compliance treatment of competing segments of the lead industry conflicts with and violates all prior federal precedents under the Occupational Safety and Health Act and related environmental statutes (*Industrial Union Dept., AFL-CIO* v. *Hodgson*, 499 F.2d 467, 478-81; *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 636-638; and *Portland Cement Assn.* v. *Ruckelshaus*, 486 F.2d 375, 389-90).

Indeed, when this case was recently before this Court in connection with petitioners' application for stay of the OSHA standard (*National Association of Recycling Industries, Inc.* v. *Secretary of Labor*, A-404), Federal Respondents appeared and generally conceded that this case does raise important questions under the Occupational Safety and Health Act which must be settled by this Court. Shortly thereafter, of course, this Court did grant a partial stay of the challenged standard pending completion of these certiorari proceedings.

**A. It Is Imperative For This Court To Decide Whether It Is Permissible Under Section 6(b)(5) Of The Occupational Safety And Health Act, For OSHA To Give Official Notice That It Is Planning To Promulgate A 100 Ug/m³ Lead Exposure Standard: To Conduct Hearings Thereon, During Which All Affected Industries And OSHA's Own Experts Seriously Question Both The Technological And Economic Feasibility Of That "100" Standard; And Then Suddenly Arbitrarily Adopt A Far Lower 50 Ug/m³ Standard, Without Establishing In Any Respect Either The Technological Or Economic Feasibility Of Said "50" Standard**

Section 6(b)(5) of the Occupational Safety and Health Act, 29 U.S.C. 655(b)(5), reads as follows:

> "(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents . . ., shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the *best available evidence*, that no employee will suffer material impairment of health or functional capacity . . .. In addition to the attainment of the highest degree of health and safety protection for

the employee, *other considerations shall be . . . the feasibility of the standards. . . .*" [Italics supplied.]

This Court has never construed the Congressional mandate for the promulgation of only "*feasible*" OSHA standards contained in this section of the Act. Until the court of appeals rendered its majority opinion in this case, however, other courts of appeals read Section 6(b)(5) to require that *each* OSHA standard, when promulgated, must be based on *substantial evidence* which establishes that the standard is both *technologically and economically feasible*; that it is not "prohibitively expensive," and that it will not result in mass closures of industrial facilities or "*adversely affect the competitive structure or posture of an industry*" (*American Federation of Labor* v. *Brennan*, CCA3, 1975, 530 F.2d 109, 120-123; *Industrial Union Dept., AFL-CIO* v. *Hodgson*, 162 U.S. App. D.C. 331, 499 F.2d 467, 477-478 (1974); *Turner Co. Div. of Olin Corp.* v. *Secretary of Labor*, CCA7, 1977, 561 F.2d 82, 83; *American Petroleum Institute* v. *OSHA*, CCA5, 1978, 581 F.2d 493, 502, aff'd. on other grounds, *sub nom Industrial Union Dept.* v. *American Petroleum Institute*, 100 S.Ct. 2844 (1980).

In the case at bar, OSHA originally proposed to establish a new lead exposure standard of *100 ug/m*$^3$. The evidence thereafter presented by the parties, OSHA included, was restricted to the proposed "100" standard — and that evidence raised serious questions about both the technological and economic feasibility of even this "100" standard for secondary lead smelters and other industry groups. At the end of the administrative proceedings, however, OSHA arbitrarily promulgated a far more stringent *50 ug/m*$^3$ standard, without bothering to produce any substantial evidence to support either the technological or economic feasibility of that lower ex-

posure limit for secondary lead smelters or any of the other major industries involved. Thus, as Judge MacKinnon emphasizes in his dissenting opinion in this case:[43]

> "The majority permits the agency to utilize as supporting evidence of feasibility the evidence introduced to support the proposed PEL at 100 ug/m³ that is far different from the one actually promulgated at 50 ug/m³. . . .
>
> "That is in substance the state of the public record in this case. *OSHA has not introduced evidence as to the feasibility of a 50 ug/m³ PEL,* and its neglect to introduce any evidence in support of a standard at that level cannot serve as a substitute for the necessary substantial evidence. . . ."[Italics supplied.].

Here, therefore, the court of appeals, by sharply divided opinion, has suddenly licensed OSHA for the first time to promulgate a completely arbitrary standard under Section 6 of the Act without producing any substantial evidence of either technological or economic feasibility to support that standard, as required by Section 6(b)(5) and the earlier court of appeals decisions cited hereinabove.[44]

Patently, this Court must review and reverse the court of appeals' majority holding in this respect or the Congressional mandate contained in Section 6(b)(5) of the Act, whereby OSHA is specifically restricted to the promulgation of "*feasible*" standards — the "*feasibility*" of which must be based on *substantial evidence* — will have been effectively *deleted* from the statute. By merely amassing a voluminous, irrelevant record with

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[43] *Id.*, at 272a; 274a.

[44] See App. to LIA petition, at 247a-248a; 255a.

reference to any proposed standard, OSHA will be free arbitrarily to adopt far more stringent standards without any proof of *feasibility* at all.

Certiorari is particularly compelling here because the evidence produced by OSHA in this case also —

(i) raises, at the very least, grave doubts about both the technological and economic feasibility of even the original proposed *100 mg/m*$^3$ standard for the entire secondary lead smelting industry;

(ii) establishes that, in order to attempt to reach even that orginial *100 ug/m*$^3$ standard, the entire secondary lead smelting industry will have to rebuild its plants in pursuit of a technological solution not presently available or proven, and clearly that dubious undertaking will be "*prohibitively expensive*" for all the relatively small, independent firms that comprise the bulk of the industry;[45]

(iii) these drastic, prohibitive requirements thus threaten "*mass closures of industrial facilities*" and loss of employment for thousands of employees in the secondary lead smelting industry; and

(iv) as demonstrated hereinabove, the OSHA standard is likewise devastatingly infeasible under Section

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[45] The record indicates it would cost the secondary smelters between $90.6 million and $630 million [in 1978 dollars] to rebuild their plants (191a, 192a). OSHA's consultants, however, produced evidence which established that the present "*average book value*" of the secondary smelter plants is in only the $50,000 — $400,000 range (*Appendix D* hereto). Thus, OSHA's experts concluded that these small firms could not possibly raise the capital required to completely rebuild, and thus they would have to exit the industry *en masse* (*Appendix D* hereto).

6(b)(5), whether it be set at 100 ug/$m^3$ or 50 ug/$m^3$, because it also destructively affects the *competitive structure or posture of the lead industry* by saddling the small, independent secondary smelters with both higher compliance costs and a far shorter compliance deadline than it imposes on their industry competitors, the primary smelters.

**B. It Is Likewise Imperative For This Court To Determine Whether It Is Permissible, Under The Act, For OSHA Arbitrarily To Threaten To Upset The Entire Competitive Structure Of The Lead Industry By Imposing Invidiously Discriminatory Compliance Costs And Compliance Deadlines On One Of The Two Competing Segments Of That Industry, When Both Segments Must Ultimately Comply With The Same Standard, And The Favored Segment Controls The Disadvantaged Segment's Ability To Pass OSHA Compliance Costs Through To Its Customers.**

The court of appeals' majority opinion, which was seemingly determined to sustain whatever OSHA did in this case regardless of the consequences, nevertheless states:[46]

> "Perhaps the most serious industry argument, that of the National Association of Recycling Industries (NARI), is that the phase-in schedule for the secondary smelters places them at a competitive disadvantage with the primary smelters."

The record before the Court establishes without contradiction from any source that secondary lead

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[46] App. to LIA petition, at 194a.

smelters and primary lead smelters strenuously compete throughout the domestic and international marketplaces for lead, and in its preamble to the 50 ug/m³ standard, OSHA concedes:[47]

> "Secondary smelters produce much of the lead used in the United States. . . .
>
> "[S]econdary producers have little control over prices, even in the short run, essentially following the market. . . . *They will be able to shift compliance costs forward onto product prices only if primary producers raise prices.*" [Italics supplied.]

Provided by its own feasibility consultants with this crystal clear picture of the competitive relationship which exists between the primary and secondary smelters, OSHA nevertheless proceeded to deal with that relationship like the proverbial "bull in a china shop." The standard it promulgated for both segments invidiously discriminates against the secondary smelters and in favor of the primary smelters in three (3) crucial respects:

(1) *Compliance Costs Required To Meet The 100 ug/m³ Standard Only* — In order to meet the *same 100 ug/m³* standard *only*, OSHA imposes the following extremely discriminatory "estimated compliance costs" on the competing industry segments: Compliance Costs Per Pound Of Product on the secondary smelters of *$0.013*; Compliance Costs Per Pound Of Product on the competing primary smelters of only *$0.004-$0.006* (43 F.R. 52982,3).

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[47] *Appendix D* hereto; 43 F.R. 54498; 43 F.R. 52979-84.

In other words, the compliance costs per pound inflicted on the secondary smelters to meet the same *interim* standard only are *more than twice* the compliance costs per pound imposed on the competing primary smelters.

OSHA has not even attempted to compute the additional compliance costs required to meet the *50 ug/m*$^3$ standard, because it has developed *no evidence* upon which that computation can be based. And, of course, both the secondary and primary smelters verily believe that OSHA's aforesaid "estimates" are only a tiny fraction of the capital costs which would actually have to be expended to rebuild all the lead production plants in the United States simply to meet the interim 100 ug/m$^3$ standard only.[48]

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[48] App. to LIA petition, at 192a.

(2) *Compliance Deadlines* — The OSHA standard thereupon grants the primary smelters, which control the entire industry's pricing structure, *ten (10) years* to comply with the *50 ug/m*$^3$ standard, while it compels the competing secondary smelters to comply with that same standard within *five (5) years.*[49]

The disastrous anticompetitive effect of this discriminatory compliance schedule is manifest. Primary producers, which OSHA concedes control market prices and which do *not* have to expend their full compliance costs for ten (10) years — and even then they are favored with substantially lower compliance costs — *can simply refrain from raising prices sufficiently to enable their secondary producer competitors to pass their higher compliance costs along to their customers.* The result would be complete destruction of the recycling segment of the lead industry because OSHA concedes:[50]

> "They will be able to shift compliance costs forward onto product prices only if primary producers raise prices."

Moreover, since the primary smelters' estimated compliance costs per pound of product to reach the 100 ug/m$^3$ standard are *less than half* the compliance costs imposed by OSHA on the secondary smelters, the primaries could actually increase prices to the extent necessary to absorb their own costs and still make it impossible for the secondaries to pass along their full compliance costs to customers.

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[49] See 43 F.R. 52983, 53008.

[50] 43 F.R. 52979-84.

(3) *Compliance Costs Required To Operate MRP Programs* — Finally, the OSHA standard imposes significantly higher Medical Removal Protection charges on the secondary smelters than those imposed on the primaries.[51] Indeed, OSHA estimates the secondary smelters will bear MRP costs *seven (7) times higher* than the primary smelters at the outset, and 60% higher each year thereafter.

The court of appeals thus correctly concluded that "*the secondaries will remain at some competitive disadvantage with respect to the primaries.*"[52] But, shockingly, completely contrary to conclusions reached by OSHA's own consultants and without anything of substance to support its ruling, the court of appeals licensed OSHA to impose these grossly discriminatory, totally destructive requirements on the small, independent secondary smelters, stating that hopefully —[53]

> "this disadvantage . . . will not pose a *fatal* threat to the secondary smelting industry." [Italics supplied.]

The court of appeals' decision in this regard is in direct conflict with all prior court of appeals rulings in cases where OSHA and the Environmental Protection Agency have unfairly sought to impose discriminatory compliance costs and requirements on competing industry segments (*Industrial Union Dept.* v. *Hodgson*, 162 U.S. App. D.C. 331, 499 F.2d 467, 478 (1974); *International Harvester Co.* v. *Ruckelshaus*, 155 U.S. App. D.C. 411. 478 F.2d 615, 636-638 (1973); *Portland Ce-*

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[51] 43 F.R. 54459-60.

[52] App. to LIA petition, at 196a.

[53] *Id.*

*ment Association* v. *Ruckelshaus*, 158 U.S. App. D.C. 308, 486 F.2d 375, 389-90 (1973)).

Thus, in *Hodgson, supra*, the court of appeals remanded the challenged OSHA asbestos standard to the Secretary of Labor with directives that the standard's economic impact on industrial competitors be re-weighed and that its discriminatory effects be eliminated (see 499 F.2d 481).

Similarly, in *International Harvester, supra*, EPA's automobile emission standards under the Clean Air Act were remanded to EPA because, as written, they might unfairly interfere with the competitive balance among competing manufacturers (478 F.2d 636-638).

Thus, it is truly imperative and critically important for this Court to settle this important question, and to resolve this obvious conflict in court of appeals' decisions. Essentially, we urge this Court to rule that, under Section 6(b)(5) of the Occupational Safety and Health Act, an OSHA standard is *not* "*feasible*" or sustainable if it invidiously and unfairly discriminates against one competing industry segment in favor of another, especially in cases where the favored industry segment already controls the industry's pricing structure and thus possesses the power to prevent disadvantaged competitors from passing their OSHA compliance costs along to their customers.

### C. It Is Also Imperative For This Court To Determine Whether It Is Permissible, Under The Occupational Safety And Health Act, For OSHA To Impose The New 50 Ug/m³ Lead Standard On The Entire Lead Industry, And All The Other Industries Before This Court, Without Proving It Is "Reasonably Necessary" And Without Providing Any Cost-Benefit Analysis To Demonstrate It Is Both Appropriate And Necessary

Petitioners submit this Court should also review and set aside OSHA's 50 ug/m³ standard because —

(i) OSHA did not prove, through substantial evidence, that significant, serious illnesses clearly resulted from industrial exposure to lead at the pre-existing OSHA standard of 200 ug/m³, or that such illnesses will not occur after hundreds of millions of dollars have been spent in a speculative attempt to reduce *industrial* exposure only to OSHA's new 50 ug/m³ PEL.[54]

(ii) OSHA thus has failed to prove that said 50 ug/m³ standard is "reasonably necessary" within the meaning of Section 3(8) of the Act, 29 U.S.C. 652(8), and this Court's recent decision in the Benzene Case (*In-*

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[54] The Court must bear in mind that, as the court of appeals found, "Lead exists naturally in the earth's crust, the atmosphere, and the hydrosphere" (App., 8a). Thus, no matter how low industrial exposure to lead is reduced, employees will still be exposed to significant amounts of lead, depending entirely on each employee's environment. Also, the court of appeals acknowledges that there is no evidence in this case of "the actual incidence of significant health effects at the old and new PELS" (App. 110a, 111a).

*dustrial Union Dept.* v. *American Petroleum Institute*, 100 S.Ct. 2844 (1980)).

(iii) OSHA has likewise failed adequately to prove why it will not still be "*appropriate*," within the meaning of Section 3(8) of the Act, for employers to continue to control industrial exposure to lead even *below* 50 ug/m$^3$ through the continued use of modern *respirators*, since OSHA and the court of appeals simultaneously concede it will still be "necessary" for secondary smelters, for example, to continue to use respirators in many of their operations, even if they do speculatively rebuild their plants as OSHA proposes.[55] This clearly feasible solution was vigorously recommended by the President's Council on Wage and Price Stability (*Appendix E* hereto).

(iv) And, OSHA has also failed to supply a *cost-benefit analysis* to demonstrate that the benefits to be produced by its new standard bear a reasonable relationship to the costs imposed by that standard (see *Texas Independent Ginners Assn.* v. *Marshall*, CCA5, 1980, 630 F.2d 398, 411; *American Petroleum Institute* v. *OSHA, supra*, at 581 F.2d 503; *RMI* v. *Secretary of Labor*, CCA6, 1979, 594 F.2d 566; *Turner Co.* v. *Secretary of Labor*, CCA7, 1977, 561 F.2d 82). The Court's attention is also directed to Mr. Justice Powell's concurring opinion in *Industrial Union Dept.* v. *American Petroleum Institute*, at 100 S.Ct. 2875 (1980). This failure by OSHA was strenuously criticized by the President's Council on Wage and Price Stability (*Appendix E* hereto).

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[55] See App. to LIA petition, at 186a-190a.

### D. It Is Equally Important For This Court To Decide Whether OSHA, Absent Any Specific Statutory Authority In The Occupational Safety And Health Act, May Validly Impose Medical Removal Protection And Multiple Physician Review Requirements On All Employers In The Secondary Lead Industry, Irrespective Of Their Size Or Financial Capabilities

OSHA has no specific statutory authority in the Occupational Safety and Health Act to impose extremely costly Medical Removal Protection wage guarantee programs, or Multiple Physician Review requiremens, on *any* employer — but certainly, OSHA may not impose such programs on *all* employers, irrespective of their size or financial capabilities — i.e., without determining whether such "standards" are *feasible* for them under Section 6(b)(5) of the Act.

As Judge MacKinnon states in his dissenting opinion, this is "the most far reaching removal system of any OSHA standard ever reviewed."[56] It flies in the face of Section 4(b)(4) of the Occupational Safety and Health Act itself,[57] which precludes OSHA from superseding or in any manner affecting any workmen's compensation law, or from *enlarging* or *affecting* in any other manner the common law or statutory rights, duties and liabilities of employers with respect to injuries or diseases arising out of their employees' employment.

It is also contrary to this Court's recent interpretation of the Occupational Safety and Health Act in *Whirlpool Corporation* v. *Marshall*, 445 U.S. 1, 100

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[56] App. to LIA petition, at 260a.

[57] 29 U.S.C. 653(b)(4).

S.Ct. 883, 894 (1980), where this Court held that "*Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular pay checks when they absented themselves from work for reasons of safety.*"

Petitioners NARI, et al. argue, in this case, that even if OSHA did have the statutory right to impose MRP and MPR programs in the general sense, which petitioners strenuously deny, Section 6(b)(5) of the Act nevertheless requires OSHA to prove the "*feasibility*" of such requirements for small, independent concerns such as those which make up the bulk of the secondary smelting industry.[58]

**E. Finally, It Is Vitally Important For This Court To Determine Whether OSHA Violated Petitioners' Constitutional Rights, Or Their Rights Under The Occupational Safety And Health Act And The Administrative Procedure Act, When It Failed To Give Them Clear, Advance Notice (A) That It Would Ultimately Promulgate A 50 Ug/m³ Standard In This Case, And (B) That The Secondary Smelters Would Be Confronted With Extremely Discriminatory, Nonuniform, Destructive Compliance Costs And Deadlines**

The lower court's majority opinion concedes that "OSHA was occasionally careless or inefficient in its procedures throughout the rulemaking," and it jocularly suggests that "procedural purists will never place the lead standard in the Pantheon of administrative pro-

[58] These issues, of course, are different than, and in addition to, the Medical Removal Protection issues this Court already has under review in the Cotton Dust case (*American Textile Manufacturers Institute, Inc.* v. *Marshall*, Nos. 79-1429 and 1583, *supra*).

ceedings."[59] Judge MacKinnon, on the other hand, states that "The agency's failure to properly notify the public that it was considering such a stringent PEL as 50 ug/m$^3$ is the root of its troubles in this rulemaking[60]

Petitioners, in turn, urge this Court to review OSHA's procedures in this case to determine whether, in truth and in fact, OSHA actually deprived the secondary lead smelters of both due process of law and their rights under Section 6(b)(2)-(4) of the Occupational Safety and Health Act, 29 U.S.C. 655 (b)(2)-(4), and the Administrative Procedure Act, 5 U.S.C. 553.

Under Section 6(b)(2) of the OSH Act, OSHA must publish "a proposed rule," and afford interested persons an opportunity to submit written data and comments. Under Section 6(b)(3), OSHA is obliged to conduct a hearing with reference to the "proposed rule." Section 6(b)(4) of the Act then requires the Secretary, after such hearing, either to issue the "rule" — or "*make a determination that a rule should not be issued.*" The Administrative Procedure Act contains similar requirements, but plainly here, OSHA was obliged to comply with its own organic statute.

In this case, OSHA's actual procedure, and the effect thereof, are accurately described as follows by Judge MacKinnon:[61]

> "Here, the agency 'proposed [a] permissible exposure limit [of] 100 ug/m$^3$. . . .' It never expressly stated it was considering or might consider the 50 ug/m$^3$ standard that it eventually promulgated. Very little evidence was submitted by industry petitioners *or the agency* on any level but the 100 ug/m$^3$, or

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[59] App. to LIA petition, at 15a.

[60] *Id.*, at 254a.

[61] Id., at 255a-257a.

higher. OSHA *concedes that no evidence whatsoever was introduced on the economic feasibility of complying with the 50 ug/m³ level.* Because of this, and after noting the thousands of pages introduced by all the parties, supporting both a stringent or lenient rule, and finding no evidence on the 50 ug/m³ level, it is plain absurdity to conclude that the parties were sufficiently informed to permit their meaningful participation in discussing the possibility that the proposed permissible exposure limit of 100 ug/m³ would be reduced 50%.

"A review of the vague statements in the notice of proposed rulemaking also points out that the 50 ug/m³ PEL is not a 'logical outgrowth' of the proposed rulemaking at 100 ug/m³. . . .

"Therefore, since reasonable notice was not given, nor evidence received as to the 50 ug/m³ level, and the majority's defense of such slipshod practice is wholly illogical, I would remand the case to OSHA for a rulemaking based on proper notice. . . ."

In addition, of course, OSHA likewise completely failed to give the secondary smelters any advance notice that they would ultimately be subjected to extremely discriminatory, nonuniform compliance costs and deadlines that threaten their very ability to continue to operate.

OSHA's actions thus effectively deprived the secondary smelters of their statutory rights under both the OSH Act and the Administrative Procedure Act, "to submit [meaningful] written data or comments" and to defend and cross-examine at the hearings with reference to both the 50 ug/m³ standard ultimately promulgated and the grossly discriminatory compliance terms finally imposed by OSHA at the very end of the administrative proceedings. In the final analysis, the secondary smelters were unfairly denied due process of law throughout the OSHA proceedings, and now their very ability to continue to exist is threatened as a result.

The court of appeals' decision affirming such "careless and inefficient" procedures,[62] therefore, seriously conflicts with the Third Circuit's decision under the OSH Act in *Synthetic Organic Chemical Mfrs. Assn.* v. *Brennan*, 506 F.2d 385, 388 (1974), *cert. den.* 423 U.S. 830 (1978), and with decisions of other federal courts under other statutes in *Arlington Oil Mills, Inc.* v. *Knebel*, CCA5, 1976, 543 F.2d 1092; *American Iron and Steel Institute* v. *Environmental Protection Agency*, CCA3, 1977, 568 F.2d 284, 290-292; and *American Standard, Inc.* v. *United States*, C.Cls., 1979, 602 F.2d 256, 267-269.

OSHA's notice of proposed rulemaking did not adequately inform the secondary smelters of the actions utlimately taken against them (*American Iron and Steel Institute* v. *OSHA*, CCA3, 1978, 577 F.2d 825, 830), in a case where those actions clearly were *not* a mere "logical outgrowth" of the provisions found in the standard originally proposed" (*Taylor Diving & Salvage Co.* v. *Dept. of Labor*, CCA5, 1979, 599 F.2d 622, 626).

## CONCLUSION

Petitioners respectfully submit that this petition for certiorari should be granted.

Respectfully submitted,

EDWARD L. MERRIGAN
*Attorney for Petitioners NARI, et al.*

6000 Connecticut Ave., N.W.
Washington, D.C. 20015
656-0210

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[62] *Id.*, at 15a.

# APPENDIX

## APPENDIX A

United States Court of Appeals
For The District Of Columbia Circuit

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September Term, 1980

No. 79-1048

UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC,
*Petitioner*

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
*Respondents*

---

**AND CONSOLIDATED CASES**

FILED OCT 24 1980

BEFORE: WRIGHT, *Chief Judge,* ROBINSON and MACKINNON *Circuit Judges*

**ORDER**

Upon consideration of the petitions for rehearing filed by petitioner National Association of Recycling Industries, by petitioners South Central Bell System, et al. and by the Industry petitioners and intervenors, it is

ORDERED by the Court that all of the foregoing petitions are denied.

*Per Curiam*
FOR THE COURT:

/s/ GEORGE A. FISHER
Clerk

Circuit Judge MacKinnon voted to grant the petitions for rehearing for the reasons stated in his dissenting opinion.

## APPENDIX B

United States Court Of Appeals
For The District of Columbia Circuit

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September Term, 1980

No. 79-1048

UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC,
*Petitioner*

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
*Respondents*

---

**AND CONSOLIDATED CASES**
FILED OCT 24 1980

BEFORE: Wright, *Chief Judge*; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, *Circuit Judges*

### ORDER

The suggestions for rehearing *en banc* filed by petitioner National Association of Recycling Industries, petitioners South Central Bell System, et al. and by the Industry petitioners and intervenors having been transmitted to the full Court and a majority of the judges in regular active service not having noted in favor thereof, it is

ORDERED, by the Court, *en banc*, that the aforesaid suggestions for rehearing *en banc* are denied.

*Per Curiam*
FOR THE COURT:

/S/ GEORGE A. FISHER
Clerk

*Circuit Judge* McGowan did not participate in the consideration of the suggestion for rehearing *en banc* filed by petitioners South Central Bell & Bell System.

Circuit Judge MacKinnon voted to grant the suggestions for rehearing *en banc* for the reasons stated in his dissenting opinion.

## APPENDIX C

United States Court of Appeals
For The District Of Columbia Circuit

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September Term, 1980

No. 79-1048

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
*Petitioner*

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.
*Respondents*

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**AND CONSOLIDATED CASES**
FILED OCT 24 1980

BEFORE: Wright, *Chief Judge*; Robinson and MacKinnon, *Circuit Judges*

### ORDER

Upon consideration of the motion of industry petitioners and intervenors for an extension of time to complete proceedings on remand, of their motion for clarification of this Court's August 15, 1980 ruling or to stay the new lead standard, of respondents' opposition to petitioners' and intervenors' request for an extension of time to complete proceedings on remand, of petitioners' and intervenors' motion for expedited consideration, and of the motions filed by respondents and by petitioner-intervenor United Steelworkers requesting extensions of time to reply to the motion for clarification or to stay, it is

ORDERED, by the Court, that petitioners' and intervenors' motion for expedited consideration is granted, and it is

FURTHER ORDERED, by the Court, that petitioners' and intervenors' motion to extend the time within which the

Secretary of Labor is to take certain specified action to and including January 30, 1981 and May 15, 1981, respectively, is denied, and it is

FURTHER ORDERED, by the Court, that petitioners' and intervenors' motion for clarification and their motion to stay the new lead standard are denied, and it is

FURTHER ORDERED, by the Court, that petitioners' and intervenors' motion that those covered by the new lead standard be allowed to meet the permissible exposure limit ("PEL") by any combination of certain specific factors is denied.

*Per Curiam*
FOR THE COURT:

/s/ GEORGE A. FISHER
Clerk

## APPENDIX D

OSHA EXHIBIT 22

CONTRACT N0. J-9-F-6-004

"PRELIMINARY TECHNOLOGICAL FEASIBILITY, COST OF COMPLIANCE AND ECONOMIC IMPACT ANALYSIS OF THE PROPOSED OSHA STANDARD FOR LEAD"

Prepared for:

United States Department of Labor Occupational Safety and Health Administration Health Standards Development Washington, D. C.

Prepared for:

John Short & Associates, Inc. 1414 Walker Bank Building Salt Lake City, Utah 84111

4.3.2 *Secondary Smelters and Refineries*

4.3.2.1 Industry Overview

The domestic secondary smelting industry is one of the most successful recycling operations in the world. It is estimated that 58% of all lead produced is technically recyclable.[1] At present the industry recycles 42-43% of all lead, a rate of recovery which is significantly above the rest of the world.

Due to recent technological improvements, secondary lead meets all the specifications demanded by primary lead users as specified by the American Society for Testing Metals. Hence, secondary lead has become virtually a perfect substitute for primary lead and the two products are viewed as homogenous. . . .

The secondary industry actively competes with the primary lead companies both nationally and internationally. In fact, the secondaries have been largely credited with breaking the international cartel's price support effort during 1974 by aggressively selling in the international market at the supported price.[2] All the secondary producers interviewed during this study indicated that they are selling or have sold abroad, and

they feel they can compete favorably with primary producers in both markets.[3] . . .

A majority of independent producers face a considerably different outlook. Most of these operations are already less efficient than the large integrated producers. Furthermore, based on extremely limited data, it appears that the rate of return on sales already hovers in the 0-3% range.[5] In addition, virtually all of these plants face, among others, compliance costs related to EPA lead in air standards.

Lastly, it appears that the average book value of independent producer assets are in the $50,000-$400,000 range, with market values much lower due to their dim future.[6] Their individual ability to raise an estimated $800,000-$1,350,000 in capital therefore appears remote at best. . . .

There is good reason to suspect that the independent secondaries would go through a winnowing process, with the least efficient, highest cost producers leaving the industry first. These firms would have little incentive to leave until forced out by compliance pressures to this or other standards. . . .

The remaining 17-19 firms, accounting for approximately 100,000 tons per year, will close over time (probably five to seven years). . . .

## APPENDIX E

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON WAGE AND PRICE STABILITY
726 Jackson Place, N.W.
Washington, D.C. 20506

FOR IMMEDIATE RELEASE
Tuesday, March 15, 1977

### COUNCIL COMMENTS ON OSHA'S PROPOSED STANDARD ON LEAD

The Council on Wage and Price Stability today urged the Occupational Safety and Health Administration (OSHA) to modify its proposed standard for exposure to lead in the workplace. OSHA's proposal would require smelters, battery manufacturers, and other firms to install engineering controls that reduce the maximum exposure level from its present 200 micrograms of lead per cubic meter of air to 100 micrograms.

In its filing before OSHA, the Council supported the goal of improving worker health and supported regulations that achieve this objective in the most cost-effective and efficient manner. The Council noted that while the proposed standard could cost the industries affected and ultimately consumers over $300 million per year, OSHA has not shown that less costly alternatives would be any less effective in reducing illness and mortality. Therefore, the Council urged that OSHA consider alternative measures to protect workers from overexposure to lead. In particular, the Council urged that OSHA not *require* engineering controls but instead allow employers to meet any promulgated standard by using the least costly means. The Council also urged greater reliance on a health performance standard based on biological monitoring to detect and correct situations which might lead to overexposure. Were such an alternative measure adopted, the Council emphasized that OSHA should not allow employers to merely rotate workers in and out of high-exposure areas without correcting the underlying exposure situation.

**The Council's Interest**

The Council was created by the Council on Wage and Price Stability Act of 1974.[1] The Council's purpose under the Act is to monitor the inflationary impact of activities in both the private and public sectors of the economy and to report its findings on such matters. With regard to the public sector, section 3(a) of the Act expressly directs the Council to:

> (5) focus attention on the need to increase productivity in both the public and private sectors of the economy;
>
> (7) review and appraise the various programs, policies, and activities of the departments and agencies of the United States for the purpose of determining the extent to which those programs and activities are contributing to inflation; and
>
> (8) intervene and otherwise particpate on its own behalf in rulemaking, ratemaking, licensing and other proceedings before any of the departments and agencies of the United States, in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings.

In addition, Executive Orders 11821 and 11949 and Office of Management and Budget (OMB) Circular A-107 authorize the Council to receive and evaluate Economic Impact Statements prepared by Executive-branch agencies about their major proposals for rules and regulations.

In the Council's view, inflation is more than simply a matter of possible increases in conventional indices such as the consumer price index (CPI). Rather, to the extent that the benefits of a proposed regulation exceed its costs, that regulation is anti-inflationary, even though the benefits may not be reflected in a lower CPI. On the other hand, if the

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[1] Public Law 93-387, as amended by Public Law 94-78, 12 U.S.C. 1904 note.

costs of a proposed regulation exceed the benefits, it is inflationary. We note also that the "cost" of a regulation may be the foregone opportunity of adopting a better one. Therefore, to the extent that the goals of a proposed regulation could be achieved in a more efficient, less costly manner than the method which the regulation contemplates, that regulation is, in a real sense, inflationary.

Under Executive Orders 11821 and 11949 and OMB Circular A-107, each agency is expected to provide for each major proposed regulation:

(1) An analysis of the principal cost or other inflationary effects of the action on markets, consumers, businesses, etc., and, where practical, an analysis of secondary cost and price effects. These analyses should have as much quantitative precision as necessary and should focus on a time period sufficient to determine economic and inflationary impacts;

(2) A comparison of the benefits to be derived from the proposed action with the estimated costs and inflationary impacts. These benefits should be quantified to the extent practical; and

(3) A review of alternatives to the proposed action with respect to their probable costs and benefits, particularly as they compare with the proposed action. . . .

**Comments on the Proposal and the Economic Impact Statement**

The Council supports the goal of removing the hazards to worker safety and health that exist in the workplace. However, in view of the very large costs associated with proposed standards and the absence of any quantification of the incremental benefits attributable to the proposal, we would urge OSHA to seriously consider alternative, less costly means of protecting workers from the hazards of lead

poisoning. Such alternatives might include strict enforcement of the existing standard coupled with biological monitoring. OSHA should consider all cost-effective means (including the use of personal protective equipment) of reducing worker exposure to lead. . . .

**Analysis of Costs**

Anticompetitive effects of the proposed regulation are potentially major in the secondary smelting and battery manufacturing industries. These two industries are characterized by the existence of a few very large firms and numerous small firms. . . .

The secondary lead smelting industry is involved in producing refined lead from reclaimed scrap materials. This secondary lead is a perfect substitute for refined lead from primary smelters. Secondary lead accounts for 60 percent of the total production of lead, and it is produced by four large firms and numerous small firms. Easier entry into this area of the lead production industry exerts pressure on what would otherwise be an oligopolistic industry. Unfortunately, the proposed lead standard, with its very high capital costs of compliance, (that do not vary in proportion to capacity) may force many of the smaller firms to close.[1] This does not mean that the Council considers all regulations to be necessarily undesirable if they tend to force some small firms out of business. Many regulations are aimed at internalizing costs that were previously external to the firm and were therefore borne by society at large rather than by producers and consumers of the product. Economies of scale may very well exist in regard to these newly internalized costs (as well as other costs in the production process), thereby reducing the economic viability of small firms. However, such a reduction in the competitive nature of the market may impose other costs on society which should be considered when costs and benefits of proposed regulations are weighed. . . .

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[1] Economic Impact Statement: Inorganic Lead, p. 6-20.

**Analysis of Alternatives**

The Economic Impact Statement does not discuss or even mention any alternatives to the proposed action on lead. It would seem that at the very least OSHA ought to consider the incremental costs and possible benefits of rigid enforcement of the existing (200 ug Pb/m3) standard plus biological monitoring of workers. Intensive employee training and orientation should be required so that those who are exposed to lead can develop work habits that minimize exposure.[1] The lowering of actual worker exposure, as measured by either blood lead levels or by other recommended biological monitoring, could thereby be achieved in a more cost-effective manner.[2]

Another alternative standard that should be given further consideration is NIOSH's recommendation issued in 1972. NIOSH urged the adoption of an eight-hour time-weighted average lead concentration in air of 150 ug/m3 combined with biological monitoring which would limit lead in the blood to 80 ug/100 g. In 1972, NIOSH presented a very strong case for this standard in terms of worker health. Biological monitoring, in particular the use of blood samples to check for overexposure to lead, coupled with full employer liability for the consequence of such overexposure, is an alternative

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[1] M. K. Williams, E. King, and Joan Walford, "An Investigation of Lead Absorption in an Electric Accumulator Factory with the Use of Personal Samples," *British Journal of Industrial Medicine*, 1969, 26, pp. 202-216. The lead exposures of men doing almost identical jobs differed by ratios of up to four to one. This could be attributed only to personal differences in working habits according to Williams *et al.*

[2] A recently issued NIOSH research report recommends maximum blood lead levels of 70 ug/100 g. and another biological test for ALA-D in the blood. The latter was found to be a more reliable indicator of overexposure to lead. J. O. Repko, B. B. Morgan, Jr., and J. A. Nicholson, *Behavioral Effects of Occupational Exposure to Lead*, NIOSH Research Report, May, 1975' HEW Contract No. HSM 99-72-123.

OSHA action that should be studied. Since biological monitoring more accurately indicates the likelihood of adverse effects than do air concentrations, and since employers would be liable for those adverse effects, the same or greater health benefits would ensue.[1] OSHA might also impose penalties on the employer whenever employees showed evidence in their blood samples (or other biological indicators) of overexposure to lead.[2] Such a standard that is so closely related to worker health could provide incentives to employers to improve their performance in this area while leaving intact their incentive to meet the performance standard in the least costly manner. . . .

A less capital-intensive means of protecting workers (such as personal protective equipment) would not burden the small firm with few employees the way the proposed standard does. Therefore, the anticompetitive effect of OSHA's proposal could be largely avoided.

In some of the work areas of the smelters as well as at the battery and pigment manufacturing plants, employees would have to wear respirators and would have to rotate work assignments and work areas within each eight-hour day in

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[1] Symptoms of overexposure usually disappear when exposure ceases unless that overexposure has existed for a long time and the symptoms have been allowed to progress untreated. Low-level lead exposure (below the proposed standard) has been found to affect various biochemical processes in the body, but it is unknown whether or not any actual harm results. There does not appear to be a latency period before the effects of overexposure manifest themselves.

[2] Any biological standard established by OSHA should, of course, provide a margin of safety for female as well as male workers. There are indications that women may be more susceptible to lead poisoning than men in the same exposure conditions. See National Academy of Sciences, *Lead* (Washington: 1972), pp. 152-154.

order to avoid an eight-hour time-weighted exposure level that exceeded the proposed standard of 100 micrograms of lead per cubic meter of air. Thus, the inconvenience and loss of productivity that might accompany the wearing of respirators and/or rotation of work assignments would be borne anyway in meeting the standard. In these areas the associated expense, training, and bother associated with respirators and revised work practices would be incurred even with the maximum possible engineering controls in place. The added cost of engineering changes to achieve the proposed standard could be avoided while achieving essentially the same results.[1] The use of respirators and protective clothing would appear to be a particularly desirable substitute for engineering controls in those high-exposure work areas that are occupied by employees for only a few hours each day.

Still another alternative not mentioned in the Economic Impact Statement appears worthy of consideration. Since the cost of engineering controls on *new* plant and equipment (for the purpose of meeting a prescribed level of exposure reductions) tends to be lower than "retrofitting" old plant and equipment, OSHA could consider tailoring the requirements accordingly, perhaps allowing old plants to meet the standard through personal protection programs and requiring engineering controls only on new plants.

**Summary and Conclusions**

The Economic Impact Statement submitted by OSHA appears to adequately represent the possible magnitude of the costs of the proposed standard but has fallen short of quantification of the incremental benefits of a more stringent lead standard. Moreover, no alternative exposure levels, means of compliance or methods of achieving equivalent

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[1] To the extent that engineering controls enabled the proposed standard to be met with less costly respirators, the net saving would be less than the cost of the engineering controls.

health effects have been studied, so that the decision-making process could not reasonably arrive at the best regulation to protect worker health. The Council urges that *to the degree feasible* these inadequacies be rectified.

Specifically, the Council recommends that OSHA seriously consider the costs and benefits of alternative changes in the lead standard. Perhaps rigid enforcement of the current standard supplemented by the proposed housekeeping and hygiene rules and mandatory biological monitoring and treatment would suffice to protect workers from overexposure to lead. In any event, data on costs and benefits should be sought which would enable OSHA to rationally decide whether or not the standard or the required means of compliance should be changed.

Respectfully submitted,

/s/ ROY A. NIERENBERG
*Assistant General Counsel*

/s/ DIANNE R. LEVINE
*Senior Economist*
*Government Operations and Research*

/s/ ROBERT W. CRANDALL
*Acting Director*

/s/ THOMAS D. HOPKINS
*Acting Assistant Director*
*Government Operations and Research*

Date: March 15, 1977

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